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82-819
No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

CLARENCE JAY CROZIER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REX E. LEE
Solicitor General
D. LOWELL JENSEN
Assistant Attorney General
ANDREW L. FREY
Deputy Solicitor General
ALAN I. HOROWITZ
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether a district court may issue an order restraining the alienation of property named in an indictment as subject to forfeiture under 21 U.S.C. 848 without conducting a full evidentiary hearing subject to the Federal Rules of Evidence at which the government bears the burden of demonstrating that it is likely to convince the jury beyond a reasonable doubt both that the defendant is guilty of violating the continuing criminal enterprise statute and that the property at issue is subject to forfeiture.

2. Whether evidence discovered and seized pursuant to a valid, untainted search warrant should be suppressed because police had improperly entered the premises before the warrant was issued, although the evidence was discovered only after the warrant was procured.

3. Whether a warrant authorizing the seizure of, inter alia, "notes and formulas * * * which are [m]aterial evidence of violation [of] 21 U.S.C. 841, 846" is impermissibly general.

PARTIES TO THE PROCEEDING

In addition to the named parties, Manuel Isadore Pine, Alan Terry Stein, and Florence Margaret Wolke were defendants in the district court and are respondents here. Question 1 pertains only to Crozier and Wolke.

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CLARENCE JAY CROZIER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 674 F.2d 1293. The opinion and orders of the district court (Apps. C-F, *infra*) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1982 (App. A, *infra*, 1a). A petition for rehearing was denied on August 17, 1982 (App. B, *infra*, 13a). On October 8, 1982, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including November 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

21 U.S.C. 848 provides in pertinent part:

Continuing criminal enterprise
Penalties; forfeitures

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Continuing criminal enterprise defined

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

* * * * *

Jurisdiction of courts

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

STATEMENT

Respondents were charged in an indictment returned January 14, 1981, with several offenses arising out of the manufacture and distribution of methamphetamine and phenylacetone.[1] In addition, Count Two of the

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[1] Count One charged all the respondents with conspiracy to manufacture, distribute, and possess with intent to distribute methamphetamine and phenylacetone, in violation of 21 U.S.C. 846. Count Two charged Crozier with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. Counts Three, Five, Six, and Seven charged Crozier, Stein, and Wolke with various substantive drug offenses, in violation of 21 U.S.C. 841(a)(1). Count Four charged Crozier and Wolke with violation of the Travel Act, 18 U.S.C. 1952. Counts Eight, Nine, and Ten charged Crozier and Stein with tax evasion, in violation of 26 U.S.C. 7201. The indictment also charged seven other persons who were not beneficiaries of the suppression orders and hence were not appellees in the court of appeals and are not parties here.

indictment named certain property of respondent Crozier's as subject to forfeiture under 21 U.S.C. 848(a)(2) as the profits of a continuing criminal enterprise. The district court entered an order restraining respondents from disposing of this property without prior approval of the court.

Prior to trial, the district court granted respondents' motions to suppress evidence seized in two different searches (App. C, *infra*, 17a-20a). The court of appeals affirmed the suppression orders and, on respondents Crozier's and Wolke's appeal, vacated the restraining order and remanded to the district court to conduct an "appropriate" hearing with respect thereto (App. A, *infra*, 1a-12a).

1. a. On April 9, 1980, several Drug Enforcement Administration (DEA) agents conducted extensive surveillance, effected two arrests, and executed five search warrants as part of a seven-month investigation into the respondents' drug manufacturing and distribution activities in the Yuma, Arizona area.[2] On the previous evening of April 8, 1980, based on surveillance of Crozier and Stein, DEA agents had obtained a warrant to search the premises of Home Ranch, Inc., in Dome Valley, Arizona, for evidence of drug manufacturing. Early in the morning of April 9, 1980, the agents observed Crozier and Stein dump a trailer full of trash at a public disposal site. Examination of the trash revealed empty containers of several chemicals used in the manufacture of amphetamines.

Home Ranch was then searched pursuant to the search warrant, and evidence was found indicating that a clandestine drug manufacturing laboratory had been operating on the premises. DEA agents then arrested respondent Stein, who had returned to his residence

[2] The background of the investigation supporting the issuance of the search warrants is summarized in the affidavits underlying those warrants, which are appended to the government's brief in the court of appeals in C.A. No. 81-1484.

and left again, as he was driving on the highway in a 1980 Oldsmobile. Respondent Crozier was also arrested about an hour later as he was driving on the highway with three passengers in a Ford. Shortly after Crozier's arrest, the three passengers, including respondent Wolke, were permitted to drive away in the car because the agents did not believe that there existed probable cause for their arrest (III Tr. 481-484).[3]

b. Based on his belief that evidence at 12498 Avenue C, the Crozier residence, and 5417 Francis Street, the Stein residence, would be destroyed before search warrants then being applied for could be executed, DEA Agent Murphy ordered other agents to secure those two premises pending the issuance of a warrant.[4] Agents then entered the Crozier residence and conducted a protective sweep to determine if anyone was present who might be destroying evidence. The agents did not discover anyone, or any evidence, in the course of this sweep. Thereafter, they stationed themselves at the doors outside the residence until the warrant arrived. See II Tr. 189-194. Agents also entered the Stein residence, where three persons were present. The agents remained inside to ensure that no evidence would be destroyed, although the occupants were permitted to leave if they wished. See May 13, 1981, Tr. 67-77; III Tr. 368-413.

At about 7:00 that evening, search warrants were issued for both residences, and the warrants subsequently were executed by DEA agents. Chemicals and labo-

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[3] "Tr" refers to the transcript of the suppression hearing.

[4] Agent Murphy was aware that Crozier and Stein had already disposed of evidence of drug manufacture at the dump earlier in the day. Several associates of Crozier's were known to be at large, including at least three who were aware of his arrest, and there were not sufficient law enforcement personnel to keep all those persons under surveillance. The agents did not know whether or not anyone was present in the residences. See II Tr. 205-209; III Tr. 474-484; IV Tr. 558-560.

ratory equipment were seized from the Stein residence, and other incriminating evidence, including a formula for producing methamphetamine and other papers, was seized from the Crozier residence.

2. Prior to trial, the district court suppressed the evidence seized from the two residences.[5] With respect to the search of the Crozier residence, the court held that the warrant was overbroad.[6] The court also held that no exigent circumstances justified the warrantless entry to secure the premises. Accordingly, the court held that the agents had illegally seized the residence and its contents when they secured the premises and therefore that *United States* v. *Allard*, 634 F.2d 1182 (9th Cir. 1981), required suppression of the evidence subsequently discovered pursuant to the search warrant (App. C, *infra*, 17a-18a).

With respect to the search of the Stein residence, the court noted that the warrant differed from the warrant for the Crozier residence in that it did not describe any particular property, instead describing the property to be seized as "[m]aterial evidence of violation of 21 U.S.C. 841, 846 * * *." While the court noted that the underlying affidavit did describe with particularity certain property, it concluded that the warrant itself was impermissibly general. In addition, as with the search

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[5] The court denied motions to suppress evidence seized in searches of Home Ranch, the Oldsmobile that Stein was driving when he was arrested, and the Ford that Crozier was driving when he was arrested (App. C, *infra*, 14a-17a).

[6] The warrant described the property to be searched for as:

> Amphetamine, precursor chemicals including Methylamine, P-2-P, Ether, and Alchol [sic], and laboratory apparatus, notes, formulas, as well as any indicia of ownership and control of the premises[,] which are materal [sic] evidence [of] violation 21 USC 841, 846, (Manufacture and Possession with intent to distribute Amphetamine and Conspiracy).

United States in C.A. No. 81-1484, App. B.

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of the Crozier residence, the court held that *United States* v. *Allard*, *supra*, required suppression of the evidence (App. C, *infra*, 18a-20a).[7]

3. On January 14, 1981, a grand jury returned an indictment charging the respondents and others with various offenses arising out of their drug manufacturing activity (see page 3 & note 1, *supra*). Count Two of the indictment, which charged respondent Crozier with conducting a continuing criminal enterprise in violation of 21 U.S.C. 848, named three parcels of real property, numerous specific items of personal property, and all other property controlled by Crozier as subject to forfeiture under 21 U.S.C. 848(a)(2). On January 16, 1981, pursuant to the power expressly conferred by 21 U.S.C. 848(d), the district court entered an order enjoining and restraining Crozier, Wolke, and other persons from disposing of the property named in the indictment as subject to forfeiture, without prior approval of the court after notice to the United States (App. D, *infra*, 21a-25a). The order further provided, however, that court approval was unnecessary if the property was needed to pay for Crozier's and his dependents' "normal and average living expenses * * * including food, clothing, normal and average household expenses, medical care, utilities, normal and average expenditures for the upkeep of vehicles, and * * * for the care of animals" (*id.* at 24a). On March 18, 1981, the court granted a subsequent motion to supplement the restraining order by including two additional parcels of real property that were not named in the indictment but in which Crozier was alleged to have a forfeitable interest (App. E, *infra*, 26a-28a).

On April 17, 1981, respondent Crozier moved to have the restraining orders dissolved. Respondent Wolke

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[7] The court also suppressed evidence seized from the Stein residence on April 11, 1980, pursuant to a second warrant. That ruling was not appealed.

subsequently joined in the motion, and the court held a hearing at which counsel for both sides argued their positions. On May 13, 1981, the court denied the motion (App. F, *infra*, 29a).

4. a. Respondents Crozier and Wolke appealed the district court's denial of their motion to dissolve the restraining orders, arguing that due process requires a hearing either before or shortly after such an order is entered. The court of appeals reversed. The court rejected the government's contention that the restraining order was justified by the determination of probable cause underlying the indictment, stating that "[a] grand jury determination is not an adequate substitute for an adversary proceeding because a defendant has no opportunity to cross-examine witnesses and the government does not assume the burden of proof" (App. A, *infra*, 6a). Because Section 848(d) does not specify the requirements for determining when a restraining order should issue, the court of appeals held that the district court must apply Rule 65 of the Federal Rules of Civil Procedure and conduct an immediate hearing (App. A, *infra*, 7a). The court held that at this hearing "'the government must demonstrate that it is likely to convince a jury, beyond a reasonable doubt, of two things: one, that the defendant is guilty of violating the Continuing Criminal Enterprise statute and two, that the profits or properties at issue are subject to forfeiture under the provisions of section 848(a)(2).'" *Id.* at 7a-8a, quoting *United States* v. *Long*, 654 F.2d 911, 915 (3d Cir. 1981). The court of appeals remanded with directions to the district court to hold an appropriate hearing (App. A, *infra*, 8a).

b. The government took a limited appeal from some of the district court's suppression orders. That appeal was consolidated with the appeal from the restraining order, and the court of appeals affirmed the suppression orders.

With respect to the search of the Crozier residence, the court stated that the warrant "did not specify what notes, formulas, documents, or physical evidence should be seized" (App. A, *infra*, 8a). The affirmance of the suppression of this evidence appears to have rested at least in part on the court's conclusion that the warrant was impermissibly general (*id.* at 9a). The court also held that there were no exigent circumstances that justified the initial warrantless entry into the residence, noting that the agents did not know whether anyone was in the house when they entered (*ibid.*). Relying on *United States* v. *Allard*, *supra*, the court held that the evidence in the house was illegally seized when the agents entered and that the government had failed to carry its "burden to show that it would have independently discovered and obtained the evidence even if it had not been illegally seized" (App. A, *infra*, 10a).

With respect to the search of the Stein residence, the court again found that there were no exigent circumstances that justified the entry and, presumably, that the seized evidence therefore had to be suppressed under *Allard* (App. A, *infra*, 11a). The court also held that the warrant that authorized the search was overbroad. *Id.* at 10a-11a.[8]

REASONS FOR GRANTING THE PETITION

1. The decision of the court below reversing the entry of the order restraining disposition of property named by the grand jury as subject to forfeiture, and conditioning the imposition of such orders upon a show-

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[8] The court of appeals agreed with the government that the suppressed evidence should be admissible against defendants who had no legitimate expectation of privacy in the areas searched, and it remanded to the district court to make findings on that issue with respect to the non-resident defendants (App. A, *infra*, 11a-12a).

ing of probable guilt by the prosecution at a pretrial adversarial hearing, has grave practical impact on the availability of the forfeiture remedy prescribed by Congress for certain classes of unusually serious offenses and should be reviewed by this Court.

a. In enacting the RICO statute (18 U.S.C. (& Supp. IV) 1961 *et seq.*) and the continuing criminal enterprise proscription of the narcotics laws at issue in the instant case (21 U.S.C. 848), Congress sought to impose strict sanctions in an effort to deter some of the most serious types of criminal activity condemned by the federal criminal laws. One of the major weapons it placed in the prosecutor's arsenal was the power, upon conviction of these offenses, to obtain a forfeiture of a defendant's interest in or profits from his criminal enterprise. In the early years of enforcement of these statutes, which were enacted in 1970, relatively little recourse was had to the forfeiture remedies. During the last several years, however, the Department of Justice has placed increasing emphasis on the use of forfeitures as an effective means of deterring organized crime and large-scale illicit drug ventures by depriving those who would engage in such activities of the economic fruits of their crimes.

Also pertinent here is the long-established policy of the Congress, embodied in the Federal Rules of Criminal Procedure, to provide only limited discovery in criminal cases, confined to specific, narrowly defined classes of items enumerated in Fed. R. Crim. P. 16. Illustrative of this policy is the refusal of Congress in 1974 to adopt a proposed revision to Rule 16 providing for pretrial exchange of witness lists in criminal cases. In explaining its rejection of this expanded form of discovery, the Conference Committee stated:

> * * * [I]t is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal

> the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

H.R. Conf. Rep. No. 94-414, 94th Cong., 1st Sess. 12 (1975).

The decision of the court of appeals in this case gravely threatens the ability of these two important policies to coexist. The court required, as a prerequisite to imposition of a restraining order on forfeitable property, that the government prove at a full evidentiary hearing that it is likely to convince a jury of the defendant's guilt and the forfeitability of the property in question beyond a reasonable doubt. This requirement severely curtails the practical effectiveness of the criminal forfeiture remedy. The hearing contemplated by the court of appeals would be nothing less than a dress rehearsal of the trial, and the practical problems inherent in participating in such a hearing would dissuade prosecutors in most cases from even attempting to obtain a restraining order. Defendants would then be free to dispose of their forfeitable assets and convert them into assets that could not be traced or reached by the government. And, as noted, the effect of the decision is not limited to 21 U.S.C. 848, the particular forfeiture provision at issue here. The RICO statute contains a similar forfeiture provision, 18 U.S.C. 1963(a), and the Ninth Circuit has already followed the decision below as controlling precedent with respect to a restraining order issued pursuant to 18 U.S.C. 1963(b) in connection with a RICO forfeiture. *United States* v. *Spilotro*, 680 F.2d 612 (1982).

Any type of adversarial hearing at which the prosecution must demonstrate the defendant's guilt gives the defense an opportunity to discover the details of the government's case, even if the government's burden

can be satisfied simply by an agent or prosecutor giving a summary of the grand jury testimony. The full evidentiary hearing contemplated by the court of appeals creates even more severe practical problems.[9] The defense is given an opportunity to cross-examine the government's witnesses—at least equivalent to taking a deposition—thereby entirely defeating the policy of limited discovery in criminal cases.

Moreover, as long as hearsay evidence is barred at the hearing, the government is forced to expose its witnesses to the defense. In some cases, this will endanger the safety of the witnesses or expose them to pressures that may prevent them from testifying at trial. The types of cases in which Congress has provided for restraining orders—RICO and continuing criminal enterprise prosecutions—are precisely the cases in which the safety of potential witnesses is most likely to be a paramount concern because of the frequent involvement of organized crime. Indeed, in this very case the district court entered a protective order because it found that "premature disclosure of the identity of certain witnesses in this case may place the safety of such witnesses in jeopardy." Order of Mar. 24, 1981, granting government's Motion for Protective and Modifying Order concerning inspection and copying of exhibits, appended to United States Br. in C.A. Nos. 81-1345, 81-1355. Because of this practical constraint, the government has determined that, if the court of appeals'

[9] The court's decision does not specifically address the question of the procedures to be used at the hearing. Its focus on the opportunity to cross-examine witnesses (App. A, *infra*, 6a) and its citation to the Federal Rules of Civil Procedure suggest, however, that the hearing is to be conducted like a trial. The Ninth Circuit recently confirmed this reading, holding that the hearing required by the decision below must be held in accordance with the Federal Rules of Evidence and noting specifically that hearsay evidence would not be admissible. *United States* v. *Spilotro*, *supra*, 680 F.2d at 619 n.4.

decision stands, it will be forced to relinquish its efforts here to restrain alienation of the property under Section 848, rather than expose its witnesses at a pretrial hearing. Thus, the court of appeals' decision, which took no account at all of the critical discovery problems that it creates, will operate to prevent the government, as a practical matter, from effecting forfeitures in many cases where Congress intended that criminals be divested of their ill-gotten gains.

b. Quite apart from the undermining of the forfeiture provisions occasioned by the court of appeals' hearing requirement, which could not conceivably have been intended by Congress, the court is simply mistaken in its assertion that a restraining order in the absence of such a hearing must violate due process. An unbiased grand jury has already determined that there exists probable cause to believe that respondent Crozier is guilty of conducting a continuing criminal enterprise and that the restrained property is forfeitable under 21 U.S.C. 848, identifying in the indictment property subject to forfeiture. It is beyond dispute that the determination of probable cause in an indictment is sufficient, without any further hearing, to support pretrial restraints on a defendant's *liberty*. At a minimum these restraints will, like a restraining order with regard to alienation of property, require that the defendant be available for trial; and conditions of bail may go further in restricting the defendant's travel or other activities pending trial. And for many defendants, of course, an inability to post bail will result in actual imprisonment during the period between indictment and trial. For all these purposes, nevertheless, the grand jury's finding "conclusively determines the existence of probable cause." *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19 (1975); *Ex parte United States*, 287 U.S. 241, 250 (1932). See also *Giordenello* v. *United States*, 357 U.S. 480, 487 (1958). If an indict-

ment suffices to bring about these potentially serious restraints on the defendant's personal liberty, it is incongruous to hold an indictment insufficient to support a restraint on the alienation of a defendant's property.[10] Indeed, when property is physically seized for the purposes of civil forfeiture proceedings, a more significant intrusion than simply a restraint on alienation, there is no requirement that a pretrial probable cause hearing be held.[11]

Even assuming arguendo that a defendant whose property is subject to a restraining order has some entitlement to a hearing at which the government must show probable cause to believe that the property is forfeitable, the court below clearly erred in holding that such a hearing must be conducted in accordance with the Federal Rules of Evidence. In *Gerstein* v. *Pugh*, *supra*, this Court held that a hearing on the issue of probable cause is necessary if an arrest is based on a prosecutor's information, rather than an indictment.

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[10] Because the district court is empowered under 21 U.S.C. 848(d) to issue restraining orders only when "proper," it may be that a defendant should be free to petition the district court to lift the restraining order if he can shoulder the burden of coming forward with evidence that the restrained property is not part of the profits of the illegal enterprise and hence not forfeitable. In the absence of such a showing by the defendant, however, the indictment should be treated as satisfying the government's burden to show probable cause.

[11] Some of the personal property named in the indictment here was seized and civil forfeiture proceedings instituted. Those proceedings were dismissed, however, because the district court refused to stay discovery pending disposition of the criminal case, and satisfying respondents' discovery requests would have jeopardized the safety of government witnesses. Pursuant to an order of the district court (App. E, *infra*, 26a-28a), these seizures were "adopted" in the criminal forfeiture proceeding and the seized property was retained by the government.

The Court rejected, however, the view that this hearing had to afford the full panoply of adversary safeguards, explaining that the issue of probable cause in connection with an arrest warrant traditionally has been reliably determined in a nonadversary proceeding on the basis of hearsay. 420 U.S. at 119-122. By the same token, a restraining order hearing, if necessary at all, can be reliably conducted if hearsay is admitted; any perceived deficiency in the probable cause determination of the grand jury is surely cured by holding a further hearing before a judicial officer at which the defendant has an opportunity to participate similar to that in a traditional preliminary hearing.[12]

c. Because the government has only recently begun to emphasize the forfeiture remedy and to seek restraining orders, the lower courts have given only limited consideration to the question presented here concerning the need for a hearing to support an order restraining the alienation of forfeitable property. One other court of appeals, in *United States* v. *Long*, 654 F.2d 911, (3d Cir. 1981), has stated that some sort of hearing is required to support a restraining order, although it does not appear to have contemplated the full-fledged adversary hearing required by the Ninth Cir-

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[12] The Federal Rules of Evidence do not require that hearsay evidence be barred at a restraining order hearing. But see *United States* v. *Veon*, 538 F. Supp. 237 (E.D. Cal. 1982). Rule 1101(d)(3) of the Federal Rules of Evidence provides that they do not apply to "preliminary examinations in criminal cases," where hearsay evidence customarily has been received. See Advisory Committee Note. To the extent the court of appeals' holding rests on Rule 65 of the Federal Rules of Civil Procedure, it is surely erroneous because criminal forfeitures plainly are governed by the Federal Rules of Criminal Procedure. See Fed. R. Crim. P. 7(c)(2) and 32(b)(2); see also Fed. R. Crim. P. 54(b)(5) (excluding *civil* forfeiture proceedings).

cuit.[13] Ordinarily, this might lead us to refrain from presenting the issue to this Court pending further litigation in the lower courts. Nonetheless, we believe that it would not be in the interest of sound administration of federal criminal justice to defer authoritative resolution of this issue pending further developments in the lower courts. This is an issue of great practical significance in RICO and continuing criminal enterprise forfeiture cases, which are ordinarily among the most important federal prosecutions, and both prosecutors and trial courts require guidance on how to handle the entry of restraining orders to prevent defendants from evading forfeitures.

Moreover, because the restraining order issue evaporates when the trial is held, there will be only a limited number of cases in which appellate courts that have not yet considered the issue will have the opportunity to give guidance to trial courts. In particular, it is only in an unusual case, such as the instant one with its accompanying Fourth Amendment issues, that the issue of the procedures needed to enter a restraining order will survive mootness long enough to reach the Supreme Court. Thus, if the Court fails to grant certiorari here, the effective use of criminal forfeiture provisions will be eliminated in the Ninth Circuit, and in other district courts that choose to follow the decision below, for a considerable period of time.

2. a. The court of appeals' holding that a warrantless entry into premises in the absence of exigent circum-

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[13] Indeed, the restraining order in *Long* was upheld on the basis of the hearing already held in the district court, although that court's finding of forfeitability rested on what appears to have been hearsay testimony by a government agent. See 654 F.2d at 915.

stances[14] requires suppression of evidence subsequently seized from those premises pursuant to a valid, untainted search warrant is completely inconsistent with the well-established exclusionary rule doctrine that only the "fruits" of an illegal search or seizure should be suppressed. See, e.g., *Wong Sun* v. *United States*, 371 U.S. 471 (1963). The court below relied exclusively on *United States* v. *Allard*, 634 F.2d 1182 (9th Cir. 1980). In *Allard*, the Ninth Circuit held that evidence seized pursuant to a warrant under circumstances similar to the instant case had to be suppressed "notwithstanding any 'independent source' supporting the warrant." 634 F.2d at 1187. The court reasoned that the warrantless entry to secure the premises was an illegal seizure of the premises and all of its contents, including the evidence there, even though the officers were as yet unaware of the existence of that evidence. *Id.* at 1185-1186. Because the government had not shown that this seizure "made no practical difference," for example, by proving that the evidence would not have been moved while a warrant was being obtained, the court concluded that the evidence discovered pursuant to the warrant search should have been suppressed. *Id.* at 1187 & n.6.

It is black letter law that only the fruits of a Fourth Amendment violation are subject to suppression and that "the exclusionary rule has no application [where] the Government learned of the evidence 'from an independent source.'" *Wong Sun* v. *United States*, *supra*, 371 U.S. at 487, quoting *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920). See also

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[14] It is our view, as we argued in both the district court and the court of appeals, that the warrantless entries in this case were in fact justified by exigent circumstances. However, because that contention is relatively fact-bound, we do not renew it in this Court.

United States v. *Crews*, 445 U.S. 463, 470-471 & n.11 (1980). The decisions below and in *Allard* strike at the heart of this doctrine. There was an illegal entry in these cases, but that entry did not cause the discovery of any evidence. Rather, the suppressed evidence derived from a completely independent source—a search pursuant to a valid warrant untainted by the illegal entry.

The Ninth Circuit's attempt in *Allard* to reconcile its approach with established Fourth Amendment jurisprudence is unavailing. First, the court erred in characterizing the police action of securing premises pending the arrival of a warrant as an illegal seizure of those premises and its contents. It is appropriate for police to take action to secure premises and preserve the status quo pending the arrival of the warrant. Cf. *United States* v. *Chadwick*, 433 U.S. 1, 13-14 & n.8 (1977). If that action can be characterized as a seizure at all, it is not an illegal seizure. The illegality in *Allard* and in the instant case was the *search* that occurred when the police entered the premises; that entry allowed them to view the contents of a private area without the requisite authorization of a magistrate. But the police here did not discover any evidence during the illegal entry and consequent search; hence, the suppressed evidence was not a fruit of that entry.

In any event, even assuming that the entry and securing of the premises was properly treated as an illegal seizure of the evidence of the premises, the Fourth Amendment does not require suppression of the evidence seized pursuant to the warrant. The only possible nexus between the securing of the premises and the subsequent discovery of the evidence was that persons present on the premises would thereby be prevented from destroying or otherwise disposing of the evidence

before the warrant could be executed.[15] But the Fourth Amendment cannot possibly protect an individual's right to destroy incriminating evidence during the time it takes to obtain a warrant. To the contrary, had the agents reason to know that evidence was in danger of being destroyed before the warrant could be procured, exigent circumstances would indeed have been present and would have justified a warrantless entry to prevent such destruction. See, e.g., *United States* v. *Santana*, 427 U.S. 38, 43 (1976).

b. The decision of the court below conflicts with decisions in several other circuits. It is irreconcilable with the Second Circuit's decision in *United States* v. *Segura*, 663 F.2d 411 (1981), petition for cert. pending, No. 82-5298, which held that evidence discovered and seized pursuant to a valid search warrant was admissible even though agents had illegally entered and secured the premises pending the issuance of the warrant. In addition, the Fifth Circuit has expressly noted and rejected *Allard* in ruling that an illegal entry did not taint a subsequent warrant search. *United States* v. *Fitzharris*, 633 F.2d 416, 421 (1980), cert. denied, 451 U.S. 988 (1981). And several other courts of appeals have reached results inconsistent with the decision below, both in connection with an illegal entry to secure premises (see *United States* v. *Beck*, 662 F.2d 527, 530 (8th Cir. 1981); *United States* v. *Kinney*, 638 F.2d 941, 945 (6th Cir.), cert. denied, 452 U.S. 918 (1981); but cf. *United States* v. *Griffin*, 502 F.2d 959 (6th Cir.), cert. denied, 419 U.S. 1050 (1974) (evidence actually discovered in plain view during illegal entry held suppressible despite later warrant search)) and in other contexts

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[15] Even this theory cannot justify the suppression of evidence discovered in the Crozier residence, since no one was home when the agents entered.

(see, *e.g.*, *United States* v. *Torgersen*, No. 82-1649 (8th Cir. Oct. 20, 1982), slip op. 4-5; *United States* v. *Bosby*, 675 F.2d 1174, 1181 (11th Cir. 1982)).

Despite this weight of contrary authority, *Allard* appears to be well entrenched in the law of the Ninth Circuit. That court has twice declined to convene en banc to review the *Allard* rule, in *Allard* itself and in the instant case, and *Allard* has been cited as binding precedent with some regularity. See *United States* v. *Kunkler*, 679 F.2d 187, 189 n.1 (9th Cir. 1982); *United States* v. *Martell*, 654 F.2d 1356, 1364 (9th Cir. 1981) (Nelson, J., dissenting), petition for cert. pending, No. 81-1772; *United States* v. *Taheri*, 648 F.2d 598, 600 (9th Cir. 1981). Accordingly, unless the Court grants certiorari here, the exclusionary rule will continue to be invoked in the Ninth Circuit to suppress evidence seized pursuant to a valid warrant and untainted by any prior illegality.

3. The court of appeals plainly erred in holding that the warrant for the search of the Crozier residence violated the Fourth Amendment's specificity requirement.[16] The warrant authorized the seizure of several kinds of items, such as chemicals, laboratory equipment, notes, and formulas that were material evidence of the crime of manufacture and possession with intent to distribute amphetamine.[17] This description specifically limited the documents that could be seized to those that were evidence of a particular crime and eliminated the possibility of a fishing expedition. It therefore plainly satisfied the standards of *Andresen* v.

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[16] The court also held the less specific warrant for the search of the Stein residence to be unconstitutionally overbroad. We do not challenge that ruling here.

[17] The court of appeals' opinion contains an incomplete quotation of the materials authorized to be seized by the warrant (see App. A, *infra*, 8a). A complete quotation is set forth at note 6, *supra*.

Maryland, 427 U.S. 463, 479-482 (1976). See, e.g., *United States* v. *Smith*, 686 F.2d 234, 238 (5th Cir. 1982); *United States* v. *Cortellesso*, 601 F.2d 28, 33 (1st Cir. 1979). Indeed, it is difficult to conceive how a search warrant for documents at a suspected drug manufacturing site could be drafted with much more specificity, and the court of appeals did not suggest how the specificity of the warrant could have been improved. For this reason, the warrant description invalidated by the court of appeals is one that is standard in warrants authorizing searches for evidence of drug offenses, and the decision below, if followed, will severely limit the ability of law enforcement agents to seize, pursuant to a warrant, incriminating evidence from a known site of criminal activity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General
D. LOWELL JENSEN
Assistant Attorney General
ANDREW L. FREY
Deputy Solicitor General
ALAN I. HOROWITZ
Assistant to the Solicitor General

NOVEMBER 1982

APPENDIX A

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

CLARENCE JAY CROZIER, MANUEL ISADORE PINE, ALAN TERRY STEIN, AND FLORENCE MARGARET WOLKE, DEFENDANTS-APPELLEES.

Nos. 81-1345, 81-1355 and 81-1484.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 1, 1982.

Decided April 20, 1982.

On appeal from Orders of the United States District Court for the District of Arizona.

Before GOODWIN and TANG, *Circuit Judges*, and SOLOMON,* *Senior District Judge*.

SOLOMON, *Senior District Judge:*

These three interlocutory appeals arose out of a criminal case against Crozier, Pine, Stein, Wolke, and seven other defendants who were charged with the manufacture and possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). They were also charged with conspiracy and tax evasion, in violation of 26 U.S.C. § 7201. Count Two of the indict-

* Hon. Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

ment charges Crozier with engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848 (1976)[1] (Section 848).

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[1] Section 848 provides:

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code, secs. 24-203 to 24-207), shall not apply.

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or

The penalties for violating Section 848 include forfeiture of all profits obtained through the criminal enterprise. The government moved *ex parte* to restrain the sale, transfer, or encumbrance of virtually all of Crozier's real and personal property, and some property belonging to Florence Wolke, who occupies the same house with Crozier, but who is not named in Count Two. The district court granted the government's request for a restraining order.

The motions of Crozier and Wolke to dissolve the restraining order were denied without a hearing. They filed interlocutory appeals,[2] in which they contend that: (1) Section 848(d) is unconstitutional, particularly as applied in this case, and (2) the Court of Appeals has jurisdiction to decide an interlocutory appeal from the district court's refusal to dissolve the restraining order issued under Section 848(d).

In the district court, Crozier, Pine, Stein and Wolke moved to suppress certain items of physical evidence. After a hearing, the district court suppressed the evidence obtained as a result of the following searches:

1. The warrantless entry into the residence of Crozier and Wolke, and the subsequent execution of a search warrant for their residence, all on April 9, 1980.

2. The warrantless entry into the residence of Stein, and the subsequent execution of a search warrant for that residence, all on April 9, 1980.

3. The warrantless seizure and the warrantless search of a 1980 Cadillac El Dorado, on April 10, 1980.

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prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

Pub. L. 91-513, Title II, § 408, Oct. 27, 1970, 84 Stat. 1265.

[2] Crozier also filed a petition in bankruptcy to prevent the foreclosure of his real property pending the outcome of this appeal. The district court held him in contempt for this action.

4. The execution of a second search warrant for the residence of Stein on April 11, 1980.

Although the district court did not rule on the validity of the El Dorado seizure, the government concedes that the seizure was the fruit of the April 9 search warrant for the Stein residence.

The government appeals from the district court's order which (1) suppressed the fruits of the search of the residence of Crozier and Wolke on April 9, (2) suppressed chemicals and laboratory apparatus seized from the residence of Stein on April 9, and (3) failed to limit suppression to those defendants who had shown a reasonable expectation of privacy in the areas searched.

The government does not appeal from the order which suppressed the documents and papers seized at the residence of Stein on either April 9 or April 11, 1980.

I.

JURISDICTION

As a general rule interlocutory appeals are not permitted, but there are exceptions. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47, 69 S.Ct. 1221, 1225-1226, 93 L.Ed. 1528 (1949), the Supreme Court granted review of "collateral orders" affecting rights independent of the merits of the action which were too important to be denied prompt review. The issue was whether a state statute requiring plaintiff's shareholder to post security for litigation costs applied in federal courts. In *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), the Supreme Court, in granting interlocutory review of a double jeopardy challenge, extended *Cohen* to criminal cases.

In this case, without a hearing either before or after the court issued its restraining order under Section 848(d), Crozier and Wolke were restrained from selling

or transferring their interest in real property which they jointly own, and from possessing, selling, or transferring a large amount of jewelry and other personal property in which one or both of them have an interest. This restraint will continue until they are tried and a jury returns its verdicts.

Until that time, the government will not be required to show that any of this property was acquired with illicit profits or to show who owns the property as between Crozier and Wolke. This is particularly important here because Wolke is not named in Count Two, the count that charges a violation of Section 848, and her property may not be subject to forfeiture.

A crucial issue is whether the defendants' rights may be irreparably lost or impaired if an interlocutory appeal is denied. Crozier and Wolke assert that as a result of the restraining order and the seizure of their property, their financial condition has worsened; they have been unable to prevent the foreclosure of one parcel of jointly held property, and they have no income to pay living or litigation expenses. They also assert that their property has been seized and restrained without a hearing on the propriety of the seizure. Unless an interlocutory appeal is granted, their due process challenge to the order will become moot after the jury returns a verdict. As a result, the constitutional question will evade review.

We agree. The rights of Crozier and Wolke may be irreparably lost or impaired if the appeal is denied. The disputed issues—the propriety of the issuance of the restraining order and which property, if any, is subject to forfeiture—are collateral to and separate from their guilt or innocence.

One reason for the policy against interlocutory review is excessive delay. It is likely that an appeal may be used as a dilatory tactic because ordinarily the trial

court loses its power to proceed once a party files a notice of appeal. *United States v. Burt*, 619 F.2d 831, 838 (9th Cir. 1980).

Here, however, the resolution of the issues raised in the appeal is collateral to and has no bearing on the outcome of the criminal trial. Under these circumstances a district court may retain jurisdiction during the interlocutory appeal and proceed with the criminal trial. *See United States v. Leppo*, 634 F.2d 101, 105 (3rd Cir. 1980).

We hold that this court has jurisdiction to hear the interlocutory appeal, and the district court retains jurisdiction to proceed with the trial.

II.

VALIDITY OF THE RESTRAINING ORDER

Crozier and Wolke assert that Section 848(d) fails to provide for notice and hearing either before or after the seizure of property or the entry of a restraining order affecting the property. They therefore contend that, even if no loss results from the restraining order, they will be unable to sell or encumber their property until the case is concluded.

The government contends that the due process constitutional safeguards that accompany seizure of property in civil cases do not apply to criminal cases because a seizure under Section 848 must be initiated by a grand jury. The government also asserts that in a forfeiture case the notice and hearing requirements do not apply when the government seizes the property.

A grand jury determination is not an adequate substitute for an adversary proceeding because a defendant has no opportunity to cross-examine witnesses and the government does not assume the burden of proof. The prohibition against taking property without due

process of law applies equally to sanctions administered under the authority of both criminal and civil statutes.

Even when exigent circumstances permit an *ex parte* restraining order, the government may not wait until trial to produce adequate grounds for forfeiture. *See Ivers v. United States*, 581 F.2d 1362, 1368 (9th Cir. 1978). Here, the property of both Crozier and Wolke has already been restrained for more than a year, and the criminal trial may be many months away. If they are acquitted, they will have been unjustly deprived of their property for more than two years, with no remedy for their loss.

Section 848(d) authorizes the district court to enter such restraining orders as it deems proper. The section does not specify requirements for determining when a restraining order should issue. In the absence of specific language to the contrary, the district court must apply the standards of Rule 65 of the Federal Rules of Civil Procedure, which requires an immediate hearing whenever a temporary restraining order has been granted *ex parte*.

In *United States v. Long*, 654 F.2d 911 (3rd Cir. 1981), the district court enjoined the transfer of an airplane which the defendant had allegedly purchased with the proceeds of illicit drug sales. The government obtained an *ex parte* restraining order under Section 848(d) and shortly thereafter a hearing was held, at which the district court found that the airplane was subject to forfeiture. The appellate court affirmed the district court's denial of the motion to dissolve the restraining order and in holding that the district court had satisfied constitutional requirements, stated:

> Before a court can issue such a restraining order, however, the government must demonstrate that it is likely to convince a jury, beyond a reasonable doubt, of two things: one, that the defendant is guilty of violating the Continuing Criminal Enterprise statute and two, that the profits or properties

> at issue are subject to forfeiture under the provisions of section 848(a)(2). *See* 21 U.S.C. § 848(d) .... In addition, these determinations must be made on the basis of a full hearing; the government cannot rely on indictments alone.

Id. at 915.

We hold that the district court erred in denying the motions of Crozier and Wolke to dissolve the restraining order without a hearing. We therefore remand to the district court with directions to hold an appropriate hearing.

III.

SUPPRESSION OF EVIDENCE FROM CROZIER RESIDENCE

The search warrant for the residence of Crozier and Wolke authorized the seizure of "amphetamine, precursor chemicals, including methylamine, P-2-P, ether and alcohol, and laboratory apparatus, notes, formulas, as well as any indicia of ownership and control of the premises." The warrant did not specify what notes, formulas, documents, or physical evidence should be seized, or what evidence would indicate ownership and control. Before the warrant was issued, the agents were directed to "secure the premises" while other agents obtained the warrant. Although the agents were not expected to enter the premises, they did enter and remain on the premises for approximately six hours before the search warrant arrived. During that time they looked in every room.

The district court held that the agents had no probable cause to believe that any controlled substance would be located within the residence, that no exigent circumstances existed to justify entry without a warrant, and that the agents had effectively seized the premises and its contents when they entered and examined the premises before the warrant arrived. The district court sup-

pressed the evidence on the authority of *United States v. Allard*, 634 F.2d 1182 (9th Cir. 1981), a case holding that the seizure of a hotel room pending procurement of a warrant could not be justified without showing exigent circumstances.

The government contends that the search warrant was sufficiently specific, because it enabled the officers "to reasonably ascertain and identify the place to be searched and the objects to be seized." *United States v. Coppage*, 635 F.2d 683, 686-7 (8th Cir. 1980).

The cases on which the government relies all involved search warrants which were narrowly drawn. They set out the type and contents of the documents to be seized. In *United States v. Federbush*, 635 F.2d 246, 251 (9th Cir. 1980), the warrant authorized seizure of documents "pertaining to Windward International Bank, Ltd." In *United States v. Louderman*, 576 F.2d 1383, 1389 (9th Cir.), *cert. denied*, 439 U.S. 896, 99 S.Ct. 257, 58 L.Ed.2d 243 (1978), the warrant specified documents and records pertaining to specific individuals and occurrences.

Here, the warrant allowed the agents wide discretion, and they seized many irrelevant papers.

The government contends that exigent circumstances justified entry into the premises before obtaining a search warrant because there was danger that the evidence would be destroyed. Even if there was evidence of drug trafficking at the Crozier residence, the district court found that there were no exigent circumstances. A "search cannot be justified solely because an agent knows that there is contraband on the premises." *United States v. Allard*, 600 F.2d 1301, 1304 (9th Cir. 1979). Here, the agents did not know whether anyone was in the house when they entered; they made no arrests until after the warrant arrived.

Evidence illegally seized before the search warrant was obtained may be suppressed. *United States v.*

Allard, 634 F.2d 1182, 1187 (9th Cir. 1980). The government then has the burden to show that it would have independently discovered and obtained the evidence even if it had not been illegally seized. *Id.* The government made no such showing.

The district court's finding that there were no exigent circumstances was not clearly erroneous, *United States v. Flickinger*, 573 F.2d 1349, 1357 (9th Cir. 1978), and the order to suppress the evidence seized from the Crozier residence is affirmed.

IV.

SUPPRESSION OF EVIDENCE FROM STEIN RESIDENCE

The Stein residence was searched twice; on April 9, 1980, and again on April 11, 1980. On April 9, after Crozier and Stein were arrested, government agents entered Stein's residence without a warrant and secured the premises for more than six hours before the search warrant arrived. The warrant did not describe any particular property. It merely authorized the seizure of "material evidence of violation of 28 U.S.C. § 841, 846. Manufacture and possession with intent to distribute amphetamine and conspiracy." The affidavit in support of the warrant was much more detailed. However, the district court concluded that the search was not limited to the affidavit, and that the warrant allowed the agents unbridled discretion.

During the April 9 search, the agents photographed jewelry within the residence, and then obtained a warrant to seize the jewelry. They seized it on April 11. The district court suppressed all evidence seized in both searches.

The Fourth Amendment prohibits general searches. Nothing may be left to the discretion of the officer executing the warrant. *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627

(1976). We hold that the warrant which authorized the search of the Stein residence was overbroad.

The government explains its warrantless entry into the Stein residence by citing the same facts used to justify its illegal entry into the Crozier residence. No one was home when the agents entered the Stein residence. In our view, there was less justification to enter the Stein residence than there was to enter the Crozier residence. The finding that there were no exigent circumstances is not clearly erroneous. The order to suppress evidence seized from the Stein residence is affirmed.

V.

STANDING

The district court suppressed all the evidence seized from the Stein residence and from the Crozier residence, not only against Stein and Crozier, but also against all of the defendants.

At the hearing, the defendants contended that each had a reasonable expectation of privacy in the residence of the other, because they would often spend days in each other's company, and often left possessions at either residence. The government concedes that Wolke lives in the Crozier residence, but denies defendants' other allegations.

Under *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), defendants charged with possessory offenses no longer have automatic standing to assert a Fourth Amendment violation. To challenge the admission of evidence, each defendant must demonstrate a "legitimate expectation of privacy" in the area searched. *Id.* at 92, 100 S.Ct. at 2553. We remand this issue to the district court for new findings in light of *Salvucci*.

The district court did not reach the question of the probative value of the evidence and whether it is admissible under Rule 403 of the Federal Rules of Evidence.

See United States v. Figueroa, 618 F.2d 934, 942-43 (2nd Cir. 1980). We therefore express no opinion on its admissibility.

CONCLUSION

The restraining order is vacated, and the district court is directed to hold an appropriate hearing.

The district court's orders suppressing evidence illegally seized are affirmed, except that the evidence seized in either residence is not suppressed for non-resident defendants. The question of what evidence may be admitted against non-resident defendants is remanded to the district court for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-1345, 81-1355 and
81-1484

[Filed Aug. 17, 1982]

UNITED STATES OF AMERICA, APPELLANT,

v.

CLARENCE JAY CROZIER, MANUEL ISADORE PINE, ALAN TERRY STEIN, AND FLORENCE MARGARET WOLKE, APPELLEES

ORDER

Before: GOODWIN AND TANG, *Circuit Judges*, and SOLOMON*, *District Judge*

The panel has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc.

The active judges were advised of the suggestion for rehearing en banc and no judge requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR81-19 PHX VAC

UNITED STATES OF AMERICA, PLAINTIFF,

v.

CLARENCE J. CROZIER, ET AL, DEFENDANTS.

[Filed July 9, 1981]

ORDER RE: MOTIONS TO SUPPRESS

The Court having had under advisement the motions to suppress of the defendants CLARENCE J. CROZIER, MANUEL I. PINE, ALLEN TERRY STEIN and FLORENCE MARGARET WOLKE, and the Court having duly considered the memoranda attached thereto, the evidence presented in support thereof and the opposition thereto, and the post hearing memoranda, the Court finds that the motions to suppress pertain to the search and seizure of the following: (1) the home ranch; (2) the 1980 Oldsmobile Toronado vehicle; (3) the 1978 Ford vehicle and 14 pieces of luggage; (4) the Crozier residence located at 12498 Avenue C., Yuma, Arizona; and (5) the Stein residence located at 5417 Francis Street, Yuma, Arizona (searches of April 9, 1980 and April 11, 1980).

THE HOME RANCH:

The Court finds that the affidavit in support of the search warrant for the home ranch was sufficient under the law to establish probable cause for the issuance thereof and that the search thereof was reasonable and pursuant to the warrant.

. . .

IT IS THEREFORE ORDERED denying the motions of the defendants to suppress as to the evidence obtained and seized at the home ranch.

THE 1980 OLDSMOBILE TORONADO VEHICLE:

The defendant Allen Terry Stein was arrested about two miles inside the California border in his 1980 Oldsmobile Toronado. No arrest warrant had been previously secured. The Court finds that the arrest took place after the discovery of the clandestine laboratory of the home ranch. The search of the 1980 Oldsmobile Toronado was lawful in that there was probable cause to believe that the vehicle contained contraband, fruits or instrumentalities of a crime, especially where it was stopped on the open highway, and the other facts which the officers had within their knowledge.

A search warrant was issued subsequent to the arrest of the defendant Stein which authorized a search of the vehicle and all luggage contained therein. The obtaining of the search warrant for the luggage in the vehicle was what is Constitutionally required. The issuance of the search warrant and the execution thereof was reasonable and pursuant to law.

IT IS THEREFORE ORDERED denying the motions to suppress in respect to the search and seizure of the evidence contained in the 1980 Oldsmobile Toronado vehicle.

THE 1978 FORD VEHICLE AND 14 PIECES OF LUGGAGE:

All that is necessary to search a vehicle on the highway is probable cause. However, regarding containers such as luggage, such items can only be searched after a search warrant is obtained, absent exigent circumstances. The Court does not find that the courts have distinguished searches of car interiors from locked

glove compartments and trunks where the search is premised on the automobile exception. This, of course, is subject to the necessity of obtaining a search warrant for the luggage. The Court finds the Government has a right to remove the vehicle to a police station or to a place of safety to avoid endangering the safety of the agents or passengers from passing traffic. The 14 containers (luggage) were searched only after a search warrant therefor had been obtained.

The question was raised by the defendants that the search warrant for the 14 pieces of luggage was authorizing only a daytime search and that it was contrary to Rule 41(c)(1), Federal Rules of Criminal Procedure. However, in respect to controlled substances, search warrants are issued pursuant to 21 U.S.C. § 879(a) which provides as follows:

> "A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time."

It is evident that § 879(a) does not require a specific showing for a nighttime search other than contraband is likely to be on the property or the person to be searched at that time. The Court has considered whether the non-fundamental violation of Rule 41 required suppression where there is no prejudice to the defendant and where there is no evidence establishing or indicating bad faith or deliberate disregard of the rule. The appropriate inquiry when determining whether the exclusionary rule should be applied in particular circumstances is to decide whether unlawful police conduct would be sufficiently deterred by exclusion, to outweigh any detrimental effects of excluding the evidence. The 14 pieces of luggage were already in the possession of the officer when the warrant was obtained

and this "nonfundamental violation" not demonstrating prejudice by the tardy execution of the warrant is not sufficient to warrant the exclusion since the search under such circumstances is reasonable within the contemplation of the law.

IT IS THEREFORE ORDERED denying the motions to suppress evidence obtained from the 1978 Ford vehicle and the 14 pieces of luggage.

THE CROZIER RESIDENCE—12498 AVENUE C., YUMA, ARIZONA:

The search warrant for these premises is objected to by the defendants in that the description of items was too general and the agents unlawfully seized items outside the warrant. The warrant in particular described the matters to be seized as "amphetamine, precursor chemicals, including methylamine, P-2-P, ether and alcohol, and laboratory apparatus, *notes*, formulas, as well as any indicia of ownership and control of the premises." The search warrant does not state what notes or formulas, nor does it indicate guidelines for the type of documents or physical evidence which constitute indicia of ownership or control of the premises. Further, in respect to the search and seizure of physical evidence at the Crozier residence, the evidence indicates that when the agents went to obtain the warrant they directed other agents to secure the premises but the entry therein had not been directed or expected by the agents giving the order. The agents had no facts that would give them probable cause to believe that methamphetamine or any other controlled substance would be located within the residence. The Court therefore concludes that no exigent circumstances existed to justify the entry by the agents into the premises without a warrant.

Further, after the officers arrived to effect entry into the premises, they were on the premises for approxi-

mately 6 hours prior to the search warrant arrival. During that time they looked in every room in order to "secure the premises" and under these circumstances they had effectively seized the premises and the contents thereof. U.S. v. Allard, 634 F.2d 1182 (9th Cir. 1981).

Since the Court concludes that the warrant was overbroad and the execution thereof constitutes an unreasonable search and seizure under the law.

IT IS ORDERED granting the motion to suppress the evidence obtained at the Crozier residence located at 12498 Avenue C., Yuma, Arizona.

THE STEIN RESIDENCE—5417 FRANCIS STREET, YUMA, ARIZONA

There were two searches of the Stein residence; the first was April 9, 1980 and the second was April 11, 1980. After the arrest of the defendants Crozier and Stein, Agent Murphy directed other agents to proceed to this address and secure the premises, obstensibly [sic] to prevent the destruction or disposal of evidence being applied for in the warrant.

A warrantless entry was made into the Stein residence on April 9, 1980 and the premises were secured at least for 6 hours before the search warrant arrived. It is axiomatic that, in general, entry by law enforcement officers into a private residence without a warrant and without consent constitutes an unlawful intrusion. *Schmerber v. California*, 384 U.S. 757 (1966). The warrant of April 9, 1980 is different than the warrant for the Crozier residence. The search warrant for the Stein residence did not describe any property whatsoever and was merely a description in very general terms, as follows:

> "Material evidence of violation of 28 U.S.C. § 841, 846. Manufacture and possession with intent to distribute amphetamine and conspiracy."

The affidavit in support of the warrant does describe with particularity certain personal items, such as gold colored coins, diamonds, emeralds, numerous rings, necklaces, et cetera, as well as books and records of financial transactions.

It is clear that the affidavit may set forth many items of property, contraband, records and documents, and that the Magistrate in his discretion may exclude items. The Court concludes that the search must be pursuant to the warrant and not necessarily pursuant to the affidavit. The warrant does not describe anything to be seized nor does it indicate that the Magistrate exercised his law given discretion in directing the agents regarding the property to be seized. A warrant merely describing "material evidence under 21 U.S.C. § 841,846 clearly leaves to the agent the unbridled discretion to seize whatever he determines is evidence in the case. Were the Court to sanction such a general warrant it would be the sanctioning of the proposition that the property to be seized need not be described with particularity and that the agent can take whatever he decides is evidence of the offense. The Court concludes that the law is to the contrary.

Further, in the search of the Stein residence, the execution thereof was so overbroad as to constitute a general search, and again as in the search of the Crozier residence, the agents effectively seized the premises and the contents thereof contrary to *U.S. v. Allard, supra*.

Subsequent to the initial search of April 9, 1980, the agents again searched the Stein residence on April 11, 1980. On the April 9th search, they photographed jewelry within the residence and then obtained the warrant in respect thereto. Since the Court has found the search of the Stein residence unreasonable and contrary to law, the Court now finds that the seizure of April 11,

1980 were the fruits of the poisonous tree which stemmed from the illegal search of April 9, 1980.

IT IS THEREFORE ORDERED granting the motions to suppress the evidence obtained from the Stein residence located at 5417 Francis Street, Yuma, Arizona, on April 9, 1980 and April 11, 1980.

Dated this 9th day of July, 198[1].

/s/ VALDEMAR A. CORDOVA

VALDEMAR A. CORDOVA
U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

NO. CR-81-019-PHX-VAC

UNITED STATES OF AMERICA, PLAINTIFF

v.

CLARENCE JAY CROZIER, A/K/A C. J. CROZIER, ET AL, DEFENDANTS.

[Filed Jan. 16, 1981]

ORDER

This matter having come on motion of the United States of America for a restraining order and establishment of a performance bond pursuant to Section 848 (a) and (d) of Title 21, United States Code, which provides for jurisdiction to enter restraining orders and take such other actions including the acceptance of satisfactory performance bonds in connection with any property or other interest subject to forfeiture pursuant to Section 848 (a)(2) of Title 21, United States Code; Section 1651 of Title 28, United States Code; and this Court's inherent power to make orders necessary and proper to the orderly carrying on of litigation brought within the Court's jurisdiction;

This Court finds that, if this Court fails to enter this order as prayed for by the United States, that upon Clarence Jay Crozier learning that the property listed below is subject to forfeiture upon conviction on Count II, that Clarence Jay Crozier, a/k/a C. J. Crozier, or his agents, servants, employees, attorneys, family and those persons in active concert or participation with him might sell, alienate, encumber, transfer, or otherwise place the property beyond the jurisdiction of this Court or detrimentally affect the Government's interest

in such property, thereby frustrating the ends of justice and causing irreparable harm to the United States by defeating such forfeiture.

IT IS HEREBY ORDERED that Clarence Jay Crozier, a/k/a C. J. Crozier; Florence Margaret Wolke, a/k/a Florence Crozier; Alan Terry Stein; Susan D. Stein; John Richard Crozier; their agents, servants, employees, attorneys, family members, and those persons in active concert or participation with them, be and are hereby enjoined and restrained from selling, assigning, pledging, distributing, giving away, encumbering, or otherwise disposing of, or removing from its present location, with the intent to conceal and hide from the jurisdiction of this Court or removing from any checking or savings account, all or part of their interest, direct or indirect, in the property listed below, real, personal, or choses in action, without prior approval of the Court upon notice to the United States and an opportunity for the United States to be heard, except as specified in this Order.

IT IS FURTHER ORDERED that the property which shall be subject to this Order shall include the following, which is all subject to forfeiture upon conviction on Count II of the captioned indictment, such property allegedly being profits obtained by Clarence Jay Crozier, a/k/a C. J. Crozier, in the charged enterprise and/or property affording a source of influence over such enterprise:

1. The real property, with all buildings, structures, fixtures, furnishings and appurtenances, known as 12498 Avenue C, Yuma, Arizona, together with approximately 35 acres adjacent thereto:

2. The real property, with all buildings, structures, fixtures, furnishings and appurtenances, known as 1912 West 18 Place, Yuma, Arizona;

3. The real property, with all buildings, structures, fixtures, furnishings and appurtenances, comprised of

approximately 228 acres in Mora County, New Mexico, purchased by Clarence Jay Crozier in March, 1980 from Jerry Hooper, further described in the copy of the warrenty deed attached hereto as Exhibit "B";

4. Various articles of jewelry, coins and related articles seized on April 9 and 10, 1980 from a 1978 Ford LTD, Arizona license WKX-310, and from a 1980 Cadillac El Dorado, Arizona license WHK-345, which items are at present in the custody of the United States Marshal's Service pursuant to seizure, pursuant to Civil Case No. 80-512-PH-CLH;

5. A 1979 Ford Bronco, California license number 185ZUR;

6. A 1979 Oldsmobile Toronado, California license number 598-XGB;

7. A 1980 GMC pickup truck, Arizona license number 3AX-725;

8. A 1978 Ford LTD, Arizona license number WKX-310;

9. A 1980 Cadillac El Dorado, Arizona license number WHK-345;

10. Tractor, plow, disc equipment and other farm equipment purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

11. A 1979 Chevrolet Caprice, California license number 277-UAB;

12. One hay hauler, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a/ C. J. Crozier;

13. One white trailer and hitch, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

14. One horse trailer, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or oth-

erwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

15. One white and green travel home, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

16. One boat, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

17. Laboratory apparatus, chemicals, and related items seized on April 9, 1980 from the guest house at the property known as Home Ranch, Inc., having the mailing address of Route 1, Box 120, Wellton, Arizona;

18. Any and all other real or personal property, wherever located, obtained or controlled by Clarence Jay Crozier, a/k/a C. J. Crozier, subject to forfeiture pursuant to the provisions of Section 848 (a)(2) of Title 21, United States Code, including, but not limited to currency, and banking and savings accounts obtained or controlled by Clarence Jay Crozier, a/k/a C. J. Crozier.

IT IS FURTHER ORDERED that prior approval of the Court is unnecessary only if it is necessary to use the property, real, personal, or choses in action, to pay for normal and average living expenses for Clarence Jay Crozier, a/k/a C. J. Crozier, and any lawful dependents supported by Clarence Jay Crozier, a/k/a C. J. Crozier, on the date of the entry of this Order, including food, clothing, normal and average household expenses, medical care, utilities, normal and average expenditures for the upkeep of vehicles, and normal and average expenses for the care of animals located on the property known as 12498 Avenue C, Yuma, Arizona, and the adjacent fifteen acres purchased by Clarence Jay Crozier, a/k/a C. J. Crozier, on or about February 14, 1979. Any expenses or expenditures in doubt should first be approved by the Court.

The Court will hear from the Government and from the defending party as soon as possible at a date to be set by the Court, on the question of the establishment of a performance bond as prayed for in the Government's Motion.

SO ORDERED this 16th day of January, 1981.

/s/ VALDEMAR A. CORDOVA

VALDEMAR A. CORDOVA
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CR-81-019-PHX-VAC

Filed March 18, 1981

UNITED STATES OF AMERICA, PLAINTIFF,

v.

CLARENCE J. CROZIER, ET AL., DEFENDANTS.

ORDER

This Court having considered the Government's Motion to Adopt Seizures and Supplement and Addend Restraining Order filed on March 11, 1981, this Court finds that there is probable cause to believe that Clarence J. Crozier may have an interest in the real property commonly known as Lot #20, Valley Citrus Estates, Yuma, Arizona, and 2490 Yowell Court, Unit #28, Yuma, Arizona, which interest may be subject to forfeiture under Court II of the indictment in the captioned case.

This Court finds that, if this Court fails to enter this order as prayed for by the United States, that upon Clarence J. Crozier learning that the property listed below is subject to forfeiture upon conviction on Count II, that Clarence J. Crozier, also known as C. J. Crozier, or his agents, servants, employees, attorneys, family, and those persons in active concert or participation with him might sell, alienate, encumber, transfer, or otherwise place the property beyond the jurisdiction of this Court or detrimentally affect the Government's interest in such property, thereby frustrating the ends

of justice and causing irreparable harm to the United States by defeating such forfeiture.

IT IS HEREBY ORDERED that Clarence J. Crozier, also known as C. J. Crozier; Florence Margaret Wolke, also known as Florence Crozier; Alan Terry Stein; Susan D. Stein; John Richard Crozier; their agents, servants, employees, attorneys, family members, and those persons in active concert or participation with them, be and are hereby enjoined and restrained from selling, assigning, pledging, distributing, giving away, encumbering, or otherwise disposing of, or removing from its present location, with the intent to conceal and hide from the jurisdiction of this Court or removing from any checking or savings account, all or part of their interest, direct or indirect, in the real property listed below, real, personal, or choses in action, without prior approval of the Court upon notice to the United States and an opportunity for the United States to be heard, except as specified in this Court's previous order of January 16, 1981:

1. The real property, with all buildings, structures, fixtures, furnishings and appurtenances, known as Lot #20, Valley Citrus Estates, Yuma, Arizona.

2. The real property, with all fixtures, furnishings and appurtenances, known as 2490 Yowell Court, Unit #28, Yuma, Arizona.

IT IS FURTHER ORDERED that the seizure of the real and personal property listed below be adopted from the civil actions previously filed by the United States (CIV-80-510-PHX, CIV-80-511-PHX and CIV-80-512-PHX) to the captioned case and that the United States Marshal's Service retain, as seized property on behalf of the United States, such real and personal property listed below pending outcome of the litigation on the instant indictment:

1. One 1980 Cadillac El Dorado, Arizona license #WHX-345, VIN #6L57NAE608456 (CIV-80-510-PHX);

2. One 1980 CMC ¾-ton pickup truck, Arizona license #3AX-725, VIN #TKL24AJ500440 (CIV-80-511-PHX);

3. One 1979 Ford Bronco, California license #185-ZUR, VIN #U15SLFC5304, its tools and appurtenances (CIV-80-512-PHX);

4. One 1979 Oldsmobile Toronado, California license #598-XGB, VIN #3Z57N9E124892, its tools and appurtenances (CIV-80-512-PHX);

5. Real property known as 12498 Avenue C, Yuma, Arizona, more particularly described as Parcels 7, 8 and 10 of the northeast quarter of Map 13, Book 103, Yuma County, Arizona;

6. Real property known as 1912 West 18th Place, Yuma, Arizona, more particularly described as Parcel 8, Map 24, Book 109, Yuma County, Arizona;

7. Real property comprised of twenty acres of farmland, more particularly described as Parcels 9, 13, 14 and 15 in the northeast quarter of Map 13, Book 103, Yuma County, Arizona;

8. Real property known as one unimproved Lot #20 of the Valley Citrus Estates, further described in Book 5 of Plots, page 108, Yuma County, Arizona;

9. Real property known as 1490 Yowell Court, Unit #28, Yuma, Arizona, more particularly described as Parcel 028, Map 84, Book 110, Yuma County, Arizona.

Dated this 18th day of March, 1981.

/s/ VALDEMAR A. CORDOVA

VALDEMAR A. CORDOVA
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
MAY 13, 1981

No. CR 81-019 PHX VAC

UNITED STATES OF AMERICA, PLAINTIFF,

v.

CLARENCE JAY CROZIER, DEFENDANT.

This matter having been under advisement,

IT IS ORDERED denying Defendant Clarence Jay Crozier's Motion for Dissolution of Restraining Order and/or Amendment Thereof; said motion is joined in by defendant Florence Margaret Wolke.

/s/ VALDEMAR A. CORDOVA
VALDEMAR A. CORDOVA
United States District Judge